THE COMMPLIANCE GROUP

December 16, 2011

Sharon Gillett
Wireline Competition Bureau
Federal Communications Commission
445 12th Street SW, Washington, DC 20554

Re: Request for Clarification of Telecommunications Relay Service Registration and Fund Contribution Requirements for Non-Interconnected VoIP Service Providers
Docket Nos. 11-47 and 06-122

Dear Ms. Gillett –

The *Comm*pliance Group, Inc., on behalf of its clientele, respectfully requests the Federal Communications Commission's ("FCC" or "Commission") prompt clarification and resolution of certain issues raised by the recently revised FCC Form 499-A and its accompanying Instructions, *2012 Instructions to the Telecommunications Reporting Worksheet, Form 499-A* ("Revised Instructions"). The Revised Instructions impose registration and Telecommunications Relay Services ("TRS") Fund contribution obligations on certain providers of "non-interconnected" Voice over Internet Protocol ("VoIP") services emanating from the Commission's implementation of the Twenty-First Century Communications and Video Accessibility Act ("CVAA").

Statement of Interest. The *Comm*pliance Group is a Washington, D.C.-based consulting firm specializing in managing and administering licensing and post-licensing regulatory compliance reporting obligations on behalf of more than 75 regulated telecommunications service providers. FCC Form 499 is one of the many regulatory filings our firm manages and administers. Our clients include providers of both interconnected and non-interconnected VoIP services, and we therefore have a real and immediate interest in obtaining clarification from the FCC regarding the recently amended Form 499 and its Instructions.

Ambiguities Requiring Clarification. Based on our understanding of the FCC's new TRS rules, as extended to non-interconnected VoIP service providers in the October 7, 2011 Report and Order entitled *In the Matter of Contributions to the Telecommunications Relay Services Fund* ("TRS Order"), all non-interconnected VoIP service providers that are obligated to contribute to the TRS Fund must register with the FCC and the Universal Service Administrative Company ("USAC") via FCC Form 499-A. Revenue from non-interconnected VoIP service providers must be reported as follows:

GENERAL INQUIRIES: 1-877-435-3461
FAX: 978-709-6077
EMAIL: MAIL@COMMPLIANCEGROUP.COM
WEB: WWW.COMMPLIANCEGROUP.COM
THE COMMPLIANCE GROUP
1420 SPRING HILL ROAD
SUITE 205
MCLEAN, VIRGINIA 22102

- In Block 4, Lines 403 through 417 as "end-user and non-telecommunications" revenues;
- In Block 4, Line 418.4 as "non-interconnected VoIP revenues not included in any other category";
- In Block 5, Line 511, revenues from resellers that do not contribute to universal service support mechanisms;
- In Block 5, Line 512 (total 403-417 and 418.4 less 511)
- In Block 5, Line 513 (uncollectibles)
- In Block 5, Line 514 (total 512 – 513) = **TRS FUND CONTRIBUTION BASE**.

Under the FCC's new rules, a non-interconnected VoIP service (A) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (B) requires Internet protocol compatible customer premises equipment. A non-interconnected VoIP service also does not include any service that is an interconnected VoIP service.

Per the FCC's rules, ONLY non-interconnected VoIP service providers that are actually subject to TRS Fund contribution obligations are required to register and report via FCC Form 499-A.[1] Thus, even if a service provider offers a "non-interconnected VoIP" service, unless it likewise meets the criteria for contribution, the provider will not be required to register and report.

Only the following providers of non-interconnected VoIP services are required to contribute to the TRS Fund (and thus must register and report) - providers that offer non-interconnected VoIP services: (a) on a stand-alone basis for a fee; or (b) with other (non-VoIP) services that generate end-user revenues (1) when those providers also offer the non-interconnected VoIP service on a stand-alone basis for a fee, or (2) when those providers also offer the other (non-VoIP) services without the non-interconnected VoIP service feature at a different (discounted) price.[2]

In other words, where interstate end-user revenues are generated from non-interconnected VoIP services offered with other (non-VoIP) services, TRS Fund contributions will not be assessed

[1] 47 C.F.R. § 64.604(C) ("A non-interconnected VoIP service provider that will provide interstate service that generates interstate end-user revenue that is subject to contribution to the Telecommunications Relay Service Fund shall file the registration information described in paragraph (c)(5)(iii)(C)(2) of this section in accordance with the procedures described in paragraphs (c)(5)(iii)(C)(3) and (c)(5)(iii)(C)(4) of this section.").

[2] The Commission's Order offers the following simple example: "For example, were a provider to offer a video gaming service with an integrated non-interconnected VoIP service for $20 per month, and also offer the non-interconnected VoIP service separately for $5 per month, the provider would be obligated to attribute $5 per month to the non-interconnected VoIP component for purposes of making TRS contributions." *In the Matter of Contributions to the Telecommunications Relay Services Fund,* CG Docket No. 11-47, Report and Order, FCC 11-150 (Rel. Oct. 7, 2011) ("TRS Order") at ¶ 15, n. 40. Likewise, based upon the TRS Order, if the same provider offered the integrated service for $20 per month, and the non-VoIP components of the service for $15 per month (without the non-interconnected VoIP component), the provider would be required to attribute $5 per month to the non-interconnected VoIP service and pay TRS Fund contributions on the $5.

against those revenues *unless* the provider of such services (1) also offers the non-interconnected VoIP service on a stand-alone basis for a fee; or (2) also offers the non-VoIP services without the non-interconnected VoIP services at a different (discounted) price.

Based upon these principles and the application of existing FCC rules, decisions, and language in the current Instructions to FCC Forms 499-A and Q, certain matters stemming from the TRS Order and the Revised Instructions require clarification. Therefore, we respectfully request clarification on the following issues.

A. Entities Qualifying as "Non-interconnected VoIP" Service Providers

The FCC's TRS Order adopted rules to implement Section 103(b) of the CVAA.[3] By enacting the CVAA, Congress authorized the Commission to implement rules and regulations applicable to providers of "advanced communications services." Under the CVAA, "advanced communications services" include:

(a) Interconnected VoIP service;
(b) Non-interconnected VoIP service;
(c) Electronic messaging services; and
(d) Interoperable video conferencing service.[4]

In the TRS Order, the FCC adopted the CVAA's definition of "non-interconnected VoIP" service. The FCC's new rule, codified at 47 C.F.R. § 64.601(a)(15), defines "non-interconnected VoIP service" as:

(i) a service that:
(A) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and
(B) requires Internet protocol compatible customer premises equipment; and
(ii) does not include any service that is an interconnected VoIP service.

Based upon this broad definition, an "interoperable video conferencing service," for example, could qualify as non-interconnected VoIP.[5] But, the CVAA lists "non-interconnected VoIP" service and "interoperable video conferencing service" as mutually exclusive categories of service. Further, the CVAA specifically instructed the Commission to codify existing TRS contribution obligations for interconnected VoIP service providers and to extend TRS contribution obligations to <u>non-</u>

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[3] *See* TRS Order. The FCC's Order became effective on November 25, 2011. *See* F.R. Vol. 76, No. 206 (Oct. 25, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-27480.pdf.

[4] Interoperable video conferencing means "a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing." 47 U.S.C. § 153(57).

[5] *See, e.g.,* TRS Order at Appendix C, ¶ 2, n. 6 ("Examples of *non-interconnected* VoIP services include…services that enable individuals to communicate by voice with other individuals solely via the Internet…").

interconnected VoIP service providers. It therefore logically follows that Congress did *not* intend interoperable video conferencing services (and electronic messaging services) to qualify as non-interconnected VoIP services or to be subject to TRS Fund contribution responsibilities. We request, confirmation, however, that the Commission does not expect providers offering interoperable video conferencing services or electronic messaging services to register and/or report revenues from these services as non-interconnected VoIP service revenues.

B. International Providers

We also request clarification concerning whether international-only non-interconnected VoIP revenue should be included within the TRS Fund contribution base. A regulated non-interconnected VoIP service provider's TRS Fund contribution base includes revenues reported in Line 412, which reports sums derived from "international calls that both originate and terminate in foreign points." The Revised Instructions provide that revenues reported in Line 412, including from "international calls that traverse the United States but both originate and terminate in foreign points" are expressly "excluded from the universal service contribution base."[6] There is no specific Instruction confirming that such "international only" revenues are likewise excluded from a non-interconnected VoIP service provider's TRS Fund contribution base.

The Revised Instructions specify that Line 412 should include "ordinary long distance revenues."[7] Since non-interconnected VoIP services are not telecommunications or ordinary long distance services, we would expect that non-interconnected VoIP service providers would not report any revenues in Line 412. However, the Revised Instructions provide, for example:

"Ordinary long distance revenues should be reported as follows:

…Line 414.1. — Ordinary long distance provided to end users using non-interconnected VoIP technologies, including toll service that employs Internet Protocol but that is not provided on an interconnected VoIP basis."[8]

This suggests that USAC may expect non-interconnected VoIP service providers to report as "ordinary long distance revenues" revenues from "international calls that both originate and terminate in foreign points" in Line 412. We therefore request clarification as to whether Line 412 must include revenues from non-interconnected VoIP services that originate and terminate abroad and merely traverse the U.S. And, if so, is this revenue exempt from TRS Fund contribution? If it is exempt, how can a filer exclude these revenues from its TRS Fund contribution base (which includes

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[6] 2012 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting 2011 Revenues), at 19, available at http://www.reginfo.gov/public/do/DownloadDocument?documentID=239260&version=1 ("Revised 2012 Instructions").
[7] *Id.* at 18.
[8] *Id.*

Line 412)? (e.g., can these revenues be reported as "non-telecom revenues" in Line 418.3 (thereby excluding them from the filer's TRS Fund contribution base))?

Likewise, determining the nature and transmission path of a completed IP-based communication is often impossible given the fractional nature of the Internet. Therefore, determining if a call "traverse[s] the United States" is also impossible for providers of non-interconnected VoIP services. Consequently we request clarification on how a service provider of IP-based communications can determine the transmission path of a call.

C. Excluding Revenues for Universal Service Fund ("USF") Purposes

As discussed above, the Revised Instructions provide that a non-interconnected VoIP provider must contribute to the TRS Fund on the basis of the revenues reported in Line 514. Line 514 includes revenues reported in Line 512 less uncollectibles as reported in Line 513. And, Line 512 totals <u>Lines 403 through 417</u> and Line 418.4 less Line 511. Therefore, a non-interconnected VoIP provider's TRS Fund contribution base is effectively: Line 403 through Line 417 + Line 418.4 – Line 511 – Line 513.[9]

A telecommunications or interconnected VoIP service provider required to contribute to the USF contributes on the basis of revenues reported in Line 423. Line 423 = Line 420 – Line 422. And, Line 420 totals Lines <u>403 through 411</u>, and <u>Lines 413 through 417</u>. Line 422 includes uncollectibles associated with the USF contribution base.

The rules require that a non-interconnected VoIP service provider subject to TRS Fund contribution requirements contribute exclusively to the TRS Fund. Such a provider is not obligated to contribute to the USF. However, based upon the Revised Instructions, a non-interconnected VoIP service provider may report for TRS purposes revenues that are reported as includable in the filer's USF contribution base. Specifically, based upon the Revised Instructions, both the TRS Fund contribution base and the USF contribution base include revenues reported in Lines 403 through 411 and 413 through 417. Therefore, a non-interconnected VoIP service provider could report revenues in any of these lines for purposes of calculating its TRS Fund contribution liability, but find these revenues subject to USF fees.

For example, the Revised Instructions specifically instruct non-interconnected VoIP service providers to report:

- In Line 404.1, the "Local service portion of revenues from local exchange service provided using non-interconnected VoIP for plans that include interstate calling as part of the flat monthly fee."
- In Line 404.2, the "Toll portion of flat rated non-interconnected VoIP local service"

[9] *Id.* at 27.

- In Line 404.3, "Revenues from non-interconnected VoIP local exchange services plans that do not include interstate calling"
- In Line 414.1, "Ordinary long distance provided to end users using non-interconnected VoIP technologies, including toll service that employs Internet Protocol but that is not provided on an interconnected VoIP basis."[10]

Each of these categories is *also* included in a filer's USF contribution base, at Line 423. Therefore, a provider reporting non-interconnected VoIP service revenues in any of these Lines for purposes of calculating its TRS Fund liability would also be subjecting these revenues to USF fees. There is no mechanism in the Revised Instructions to permit a filer to exclude revenues reported in these categories for TRS purposes from their USF contribution bases as reported in Line 423. Therefore, we respectfully request that the Commission clarify how a filer reporting non-interconnected VoIP service revenues for purposes of calculating its TRS Fund contribution responsibility can back out such revenues for purposes of totaling its USF contribution base (i.e. how can it exempt revenues reported in Lines 403-417 from USF fees).

D. Block 3 and Block 5 Reporting

The Federal USF contribution mechanism contemplates that carriers providing telecommunications services to other carriers for resale must report revenue in accordance with the Carrier's Carrier rule ("CCR"). Per the Revised Instructions, revenue verified in accordance with the CCR must be reported in Block 3 of FCC Form 499-A. This revenue is excluded from a filer's USF contribution base.

Per the Commission's TRS Order, non-interconnected VoIP service providers are required ONLY to contribute to the TRS Fund, and not the other Fund mechanisms (i.e. USF, LNP, NANPA). TRS contributions for non-interconnected VoIP service providers are based upon the sum reported on Line 514. Line 514 includes the sum of Lines 403-417 and 418.4, less Lines 511 and 513. Lines 403-417 and 418.4 report only end-user revenues and do not address resale or carrier's carrier revenues. It is unclear from the precise language of the Revised Instructions whether non-interconnected VoIP service providers are required to complete Block 3. There are no specific instructions directing them to report any revenues in Block 3.

Furthermore, because Block 3 revenues are entirely excluded from the TRS Fund contribution equation, revenues reported in this section are irrelevant for purposes of calculating a non-interconnected VoIP service provider's contribution liability. In other words, revenues reported in Block 3 include revenues from services to other carriers. Revenues from services provided to resellers are not end-user revenues, and thus would not be included in a filer's TRS Fund contribution base. Therefore, there is no basis for requiring a non-interconnected VoIP service provider to report revenues in Block 3.

Moreover, Block 3 includes only revenues that have been verified in compliance with the CCR (i.e. reseller customers have provided evidence allowing the filer to reasonably conclude that the

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[10] *Id.* at 15.

resellers contribute directly to the USF). The CCR applies ONLY to revenues reported for USF purposes; it has not been expressly extended to the other funding mechanisms (TRS, LNP and NANPA). Therefore, under the FCC's rules, a non-interconnected VoIP provider, reporting for the purpose of and contributing exclusively to the TRS Fund, is not obligated to comply with the CCR and report revenues in Block 3.

However, certain instructions suggest that some non-interconnected VoIP revenues should be reported in Block 3. For example, the instructions provide:

> Line 314 - Revenues from all non-interconnected VoIP services sold to contributing resellers that are not otherwise includable in Lines 303 to 313.[11]

It is unclear why, if non-interconnected VoIP service providers are required only to report revenues in Block 4, the Revised Instructions provide for the reporting of non-interconnected VoIP revenues in Line 314 in Block 3. Therefore, we seek clarification as to whether non-interconnected VoIP providers are required to report any revenues in Block 3.

In addition, filers must provide a geographic percentage breakdown of revenue reported in Block 3 and Block 4 on Lines 503-510. This percentage allocation is used to determine Local Number Portability ("LNP") allocations. Non-interconnected VoIP service providers are exempt from LNP contribution obligations. Moreover, because a filer's TRS Fund contribution base does not include Lines 503-510, we expect that a non-interconnected VoIP service provider is not required to report revenues in Lines 503-510. However, we request that the FCC confirm that providers of non-interconnected VoIP services are exempt from reporting information in these lines.

E. Line 511 Reporting

The FCC's TRS Order requires non-interconnected VoIP service providers with a TRS Fund contribution obligation to "register" with the Commission. However, the FCC elected not to amend its existing 499 registration requirement under 47 C.F.R. § 64.1195 to include non-interconnected VoIP service providers. Instead, it simply instructed providers to obtain FRNs.[12] The Commission ordered non-interconnected VoIP service providers to (1) register with the Commission and designate a District of Columbia agent for service of process using FCC Form 499-A in accordance with the form's instructions by December 31, 2011;[13] and (2) complete and submit FCC Form 499-A to report fourth-quarter 2011 interstate end-user revenues, which shall be the basis for TRS Fund contributions for the 2012-2013 funding period, by April 1, 2012.[14]

Generally, when a filer registers with USAC via FCC Form 499-A, USAC assigns a Filer ID to the filer. However, because the Commission established a separate registration mechanism for TRS-contribution eligible non-interconnected VoIP service providers, it is not clear that such providers will receive Filer IDs upon registration with USAC.

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[11] Revised 2012 Instructions at 19.
[12] *See* TRS Order at ¶¶ 20-21.
[13] TRS Order at ¶ 31.
[14] *Id.*

The Revised Instructions permit carriers (including non-interconnected VoIP service providers) to back out certain revenues in Line 511. Specifically, Line 511 includes revenues from resellers that do not contribute to universal service support mechanisms that are included in Block 4. These revenues may be excluded from the contributor's TRS contribution base. But, the instructions provide that:

> Filers choosing to report revenues on Line 511 must have the FCC Filer 499 ID for each customer whose revenues are so reported.[15]

Per the Revised Instructions, filers must treat revenues from non-contributing resellers as end-user revenues reported in Block 4. Therefore, non-interconnected VoIP service providers would include both revenues from services provided directly to end users and revenues from non-contributing resellers in Block 4 (Lines 403-417 and 418.4). Likewise, wholesale service suppliers would include revenues from their non-interconnected VoIP service provider reseller customers in Block 4. Line 511 provides a mechanism for wholesale service providers to exclude revenues from resellers that do not contribute directly to the USF mechanisms from their contribution bases for purposes of calculating their TRS liability. However, to take advantage of this option, the wholesaler must be able to provide the Filer IDs of all reseller customers whose revenues are included in Line 511. Therefore, we seek confirmation that registered non-interconnected VoIP service providers will be assigned Filer IDs, thereby allowing their wholesale suppliers to back out revenues from these customers for purposes of TRS Fund contributions in Line 511.

F. Pass-Through Fees

The CCR requires wholesale providers to verify that they have a reasonable expectation that their reseller customers will contribute directly to the USF. Wholesale providers may exclude revenues derived from verified reseller customers from their USF contribution bases. Per USAC's Revised Instructions, a wholesale provider must "have documented procedures to ensure that it reports as 'revenues from resellers' only revenues from entities that reasonably would be expected to contribute to support universal service."[16] To "verify" a carrier's status, the wholesaler should maintain its:

- Filer 499 ID
- Legal name; address; name of a contact person; phone number of the contact person
- The annual certification by the reseller
- Evidence of the filer's use of the FCC's website to validate the contributor status of the reseller.[17]

Non-interconnected VoIP service providers must contribute ONLY to TRS. They are exempt from contributing to the USF and other mechanisms. Therefore, they will not appear on the FCC's

[15] Revised 2012 Instructions at 27.
[16] Revised 2012 Instructions at 21.
[17] *Id.*

website as direct USF contributors.[18] And, because they do not contribute directly, they cannot truthfully certify that they are exempt from pass-through charges as direct contributors. Therefore, per the Instructions, they must be treated as end users by their underlying carriers.[19] In other words, because non-interconnected VoIP service providers do not register and contribute directly to the Fund, for USF purposes, they are treated by their suppliers as end users and will be assessed pass-through charges.

This result is contrary to both the intent of Congress and the Commission's rules which clarify that non-interconnected VoIP providers should be responsible only for contributing to the TRS Fund. By enabling USAC to collect indirectly funds that it could not collect directly, the Commission would be acting against its own rules and the intent of Congress.

The only other manner in which non-interconnected VoIP providers can escape indirect USF pass-through fees would be if the Commission permits wholesale providers to exclude from their USF contribution bases those revenues derived from any provider certifying that it is a registered non-interconnected VoIP service provider. Wholesale providers should be required to modify their USF exemption forms to include this exemption. Alternatively, the Commission may consider adopting (through a public notice and comment process), a standardized USF exemption form.

G. Need for Rulemaking

Finally, we conclude by noting that the changes adopted by the FCC in the recent amendments to the *2012 Instructions to the Telecommunications Reporting Worksheet, Form 499-A* have a serious, substantive impact on new and existing Federal TRS Fund contributors. While we understand that these changes were anticipated by the FCC in its October 7, 2011 TRS Order, we suggest that the FCC issue drafts of all amended Instructions and Forms 499 for comment *before* adopting substantive changes to the reporting methodology. Doing so will allow all contributors to understand changes to the reporting methodology and provide feedback necessary to ensure the Federal Universal Service Support Funds are administered in a transparent, equitable, and efficient manner.

Indeed, public comment will almost certainly allow the FCC and USAC an opportunity to provide clarification of specific rules and solicit comments from those the new rules actually affect. Public comment is also necessary to remain consistent with the Administrative Procedure Act, particularly for substantive changes like those adopted in the revised FCC Form 499-A. In this instance, had the FCC sought comment prior to issuing the Revised Instructions and amended Form

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[18] Moreover, as noted above, because the FCC explicitly elected not to amend the existing registration requirement, it is unclear whether non-interconnected VoIP service providers will even be assigned 499 Filer IDs.

[19] Revised 2012 Instructions at 3-4 ("Some providers may be exempt from contributing to USF, but nevertheless must file this Worksheet because they are required to contribute to TRS, NANPA, or LNPA. For USF-purposes, these noncontributors must be treated as end users by their underlying carriers and therefore may end up contributing indirectly as a result of USF pass-through surcharges.").

499-A, comments would undoubtedly have addressed some if not all of the issues raised in this letter, and the Commission could have incorporated the industry's concerns into the Form and Instructions before their adoption, preventing unnecessary confusion.

We thank you in advance for your attention to these issues. Clarification of these items will clearly assist new and existing VoIP providers to maintain compliance with the FCC's rules. If you have any questions about the changes described in this letter, please do not hesitate to contact me at cac@commlawgroup.com.

Respectfully Submitted,

Christopher A. Canter, Esq.

The *Comm*pliance Group, Inc.

CC:

Richard Belden
Chief Operating Officer
Universal Service Administrative Company
2000 L Street, NW, Suite 200
Washington, DC 20036

Robert D. Binder
Director of Industry Support for the High Cost and Low Income Program
Universal Service Administrative Company
2000 L Street, NW, Suite 200
Washington, DC 20036